Supreme Court, U. S.
FILED
NOV 24 1980
MICHAEL RODAK, JR., CLERK

No. 79-404

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The basic legal issue presented by this case concerns the kind of information upon which officers policing the border may rely to make an investigative stop of a vehicle they suspect may be carrying illegal aliens. The heart of the court of appeals' holding lies in its requirement that the stopped vehicle or its occupants exhibit some specific suspicious attribute or behavior, and its corollary conclusion that the agents may not rely on deductions made from circumstantial evidence other than direct observation (what the court of appeals and respondents consider a "profile"). As to this central issue, we rest upon

the arguments adduced in our opening brief. We here address certain additional matters raised in respondents' briefs.

1. In reaching its decision of this issue, the court of appeals appeared to accept in large measure the facts as we have laid them out in our opening brief, but found them insufficient to justify the officers' actions. Respondents, however, challenge both the foundation for, and our characterization of, the evidence presented at the hearing on their motion to suppress. Even were respondents correct in many particulars, there would still have been sufficient reasonable suspicion to justify a brief stop of a vehicle in the border area to investigate suspected alien smuggling. In fact, however, their challenges are without merit.

a. Respondents claim (Cortez Br. 4-5; Hernandez-Loera Br. 4 & n.4) that there is no basis in the record for Border Patrol Officer Gray's testimony (J.A. 60) to the effect that the officers had reason to believe that Chevron preferred to travel on or near weekends. That testimony, however, is supported by other evidence in the record from which the district court could have concluded that three of the four sets of Chevron tracks previously observed had been made during or shortly after a weekend (the officers' surveillance and the stop at issue were made during the early morning hours of Monday, January 31, 1977).

Officer Gray testified (J.A. 55) that on Tuesday, January 4, he observed one set of Chevron prints that "appeared to be a day or two old" and another set that had been made "[a]pproximately a week [ago]." Thereafter, on Sunday, January 16, Officer Gray and another border patrol officer, James Rayburn, observed one set of Chevron tracks that they believed had been made the night before ("within the previous

twelve hours or so") (J.A. 39) and another set that Officer Gray estimated (J.A. 58) to have been "five days to a week old," which meant they had been made the previous Sunday, Monday or Tuesday.[1]

b. Respondents attempt (Cortez Br. 5; Hernandez-Loera Br. 5-6) to portray as groundless the officers' assumption (J.A. 62-63) that a Chevron-led group of aliens would begin its march at approximately 6:00 p.m. and would therefore arrive at milepost 122, the expected pickup point, between 2:00 and 6:00 a.m. (respondents apparently do not challenge the eight to 12 hour estimated duration of the march, but only the estimated departure time). This assumption, however, is amply justified by the record, which contains evidence that on January 30, 1977, it became dark at approximately 6:00 p.m. (J.A. 85) and that aliens on previous Chevron-led marches had been walking in the darkness from shortly after the beginning of their journey (J.A. 40, 56, 62-63).

c. Respondents also challenge (Cortez Br. 5-6; Hernandez-Loera Br. 4-5 & n.5, 6 n.6) both our assertion (U.S. Br. 3, 20) that the officers concluded that the pickup vehicle would approach the aliens from and return with them to a point east of the pickup point and the rationality of that conclusion.

Contrary to Respondent Cortez's contention (Br. 5-6), it is clear that the officers in fact proceeded on

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[1] Initially, Agent Rayburn testified (J.A. 24) that the latter set of tracks were made "some three to four days prior," which would have been a Wednesday or Thursday. Later in his testimony, he explained (J.A. 47) that because it had rained since those tracks had been made, it was not possible to say when they had been made. In any event, Agent Gray, not Agent Rayburn, participated in the January 31 stop of respondents.

the basis of such a conclusion, else they would not have focused their surveillance on vehicles that passed them traveling westward and returned traveling eastward (J.A. 64). Officer Gray explained why it was necessary for the officers to observe traffic in both directions (*ibid.*):

> The reason we were watching for the traffic in a westbound direction was for—to get possibly an idea of the vehicle and the time it took to see if it did come back by our location.

Nor was the assumption about likely direction of travel without a rational basis. Officer Gray testified (J.A. 59) that he and Officer Evans "assumed that because the aliens were walking in an eastward direction after hitting the highway that apparently the [pickup] vehicle would be going in the same direction or that therefore, to myself there wouldn't be any need for them walking in an eastward direction." Contrary to Respondent Hernandez-Loera's suggestion (Br. 6 & n.6, 23), Officer Gray must have been referring to the direction taken by the vehicle *after* it picked up the aliens, because a vehicle's traveling toward the west to meet the aliens would not have been at all inconsistent with their walking toward the east. Thus, the officers reasonably concluded that the pickup vehicle's destination was east of the pickup point on the ground that it was unlikely that the aliens, after a long overland march, would be walking away from their ultimate destination (J.A. 59, 84).[2]

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[2] Although the officers did not explain (perhaps because they were not asked) their reasons for believing that the pickup vehicle would approach the aliens from the east, common sense suggests that a vehicle that made frequent pickups would more likely come from its ultimate destination. Similarly, the aliens' action in walking east once they

Neither the existence nor the validity of these assumptions is detracted from by Officer Gray's testimony on cross-examination (J.A. 92) that he had no "definite information" concerning the origin or destination of the recovery vehicle. Contrary to respondent Hernandez-Loera's contention (Br. 5 n.5), we have never asserted that the officers had "information regarding 'the particular movements of the suspected pickup vehicle,'" but only that they were aware of facts "from which they were able *to deduce* a likely and very specific modus operandi in terms of * * * the particular movements of the suspected pickup vehicle" (U.S. Br. 15; emphasis added).

d. Respondents also challenge (Cortez Br. 6-8; Hernandez-Loera Br. 23-24) as arbitrarily underinclusive the officers' decision not to observe and stop sedans or commercial (linen company) vans that passed them heading west and again heading east within the estimated time span.[3] Since the officers did not make a specific record of such vehicles as they passed in a westward direction, there is no way of knowing whether any of them returned eastward during the period of observation (although given the time of night and the sparse population in the area, there can hardly have been many, if any, roundtrip

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had reached the highway is explicable only if the pickup vehicle were approaching from the east; were it coming from the west, the group would simply have waited by the highway for its arrival, rather than pointlessly walking away from the vehicle.

[3] Of course, respondents also challenge the standard employed by the officers on overinclusion grounds. In that connection, it is significant that no vehicle other than respondents' was stopped during the officers' almost five and one-half hour surveillance period (J.A. 102, 113). In any event, respondents' "overinclusion" argument is nothing more than a contention that the officers lacked founded suspicion, which we have answered in our opening brief (at 11-15).

travelers other than respondents during the period). In any event, the officers' decision to focus their attention upon the types of vehicles most likely to be employed for transporting groups of illegal aliens, far from being unreasonable, represents precisely the kind of rational assessment of the likelihood of criminal activity that the Fourth Amendment demands.[4]

e. Respondents imply (Cortez Br. 8; Hernandez-Loera Br. 8) something questionable from the fact that, as their vehicle passed the officers going west, Officer Gray was able to note the first four digits of its license plate number but was not able fully to describe the vehicle (J.A. 65-66), while Officer Evans, who was not as close to respondents' vehicle as it passed, was able to give a fuller description of the vehicle (J.A. 103-104, 108). As both officers testified (J.A. 65-66, 104), however, they had pre-arranged that Officer Gray would try to get the license plate number of any passing van, truck, or camper while Officer Evans would attempt to observe the vehicle itself, presumably in order to obtain the most information possible during the short time in which a vehicle passed by.

f. Respondent Cortez also attempts (Br. 7, 17, 23, 24-25) to attribute the officers' decision to station themselves at milepost 149, near the intersection of Highways 86 and 286, rather than at milepost 122, the expected pickup point, to the officers' "[having] no idea of [respondents'] vehicle's route" (see also Hernandez-Loera Br. 16-17). As Officer Gray testified (J.A. 61), however, the officers' "first commitment was to the Altar Valley," to which Highway

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[4] Officer Gray provided a reasoned explanation for the conclusion that sedans or linen trucks were less likely than vans or campers to be employed in Chevron's operation (see J.A. 79, 100).

286 leads (J.A. 61). Thus, by stationing themselves at the junction of Highways 86 and 286 the officers could both observe the east-west traffic on Highway 86, where they expected to find Chevron and his group (J.A. 60), and still cover their assigned beat (J.A. 61-62).[5]

2. Before this Court, both respondents attempt (Cortez Br. 10-11; Hernandez-Loera Br. 12-18) to characterize the stop of their vehicle as a search, presumably for the purpose of requiring of the government a showing more rigorous than that of founded suspicion. As the officers testified, however, no search of the vehicle took place until after the officers knew from the lifting of a curtain that the rear of the camper was occupied (J.A. 68-69)[6] and after respondent Cortez consented to the search.[7]

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[5] Officer Gray also testified (J.A. 62) that regulations required that both officers be together at all times, and that there was a shortage of manpower.

[6] Even if the facts known prior to the stop did not amount to probable cause, this additional information would, in our view, have supported a search even in the absence of consent.

[7] The testimony was in exact contradiction on the consent point. While Officer Gray testified (J.A. 70) that respondent Cortez opened the back door of his vehicle without being asked to do so, respondent testified (J.A. 122) that Officer Evans told him to open the camper. From the record of the suppression hearing (J.A. 14, 16, 71), it appears that the motion to suppress was directed to the validity of the stop of respondents' vehicle and not to the subsequent search thereof. In any event, since the district court denied the motion to suppress, either it must have believed Officer Gray's testimony, or the validity of the subsequent search of the vehicle must not have been properly before it. We further note that the existence or validity of respondent Cortez's consent to the search was not raised by respondents on their appeal. Therefore, that issue is not properly before this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977).

Nonetheless, respondents rely (Cortez Br. 8, 10-11, 22; Hernandez-Loera Br. 7 & n.8, 12) on testimony indicative of an intent on the part of the officers to search the cars that they stopped. Whether they intended to search any vehicle that was stopped is questionable, however. The fact that Officer Gray answered in the affirmative leading questions concerning whether he would have searched the cars he stopped (J.A. 77-78) does not preclude the implication that he would have done so only if the initial stop had resulted in probable cause or consent to search, as happened in the present case. Indeed, when Officer Gray was given the opportunity to describe in his own words his intention in stopping respondents' vehicle, he testified (on cross-examination) as follows (J.A. 81):

> Q. You were stopping the vehicle, were you not, to search it?
>
> A. To establish alienage of the occupants, visible occupants.

In any event, an officer's subjective intent is irrelevant to a determination of the lawfulness of a search. See *United States* v. *Mendenhall*, No. 78-1821 (May 27, 1980), slip op. 12-14 (opinion of Stewart, J.); *Scott* v. *United States*, 436 U.S. 128, 137-138 (1978). Thus, in the present case, even if Officer Gray had an intent to search respondents' vehicle regardless of the existence of probable cause or consent, since that intent was never put into action, it does not raise the showing required of the government above that of founded suspicion.

3. Finally, respondents contend (Cortez Br. 12-13; Hernandez-Loera Br. 17-18) that the officers should have obtained "advance judicial approval for their decision to conduct searches on High-

ways 86 and 286 on the early morning of January 31st between the hours of 2:00 and 6:00 a.m." However, it is well settled that warrantless stops or searches of vehicles on the highway are permissible under the Fourth Amendment, provided the requisite founded suspicion or probable cause exists. We read Justice Powell's suggestion (*United States* v. *Brignoni-Ponce*, 422 U.S. 873, 882 n.7 (1975); accord, *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 283-285 & nn.3, 4 (1973)) that warrants "could be issued to stop cars in a designated area on the basis of conditions in the area as a whole and in the absence of reason to suspect that any particular car is carrying aliens" as intended to address circumstances in which there exists neither founded suspicion nor probable cause, as those terms are normally used; we think it plainly is not directed to cases like the present one, in which clues from, and investigations of, past border crossings led by the same suspect resulted in the existence of founded suspicion, if not probable cause.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1980

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